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No. 314

In the

Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, INTERVENOR,
Petitioner,

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., and SUNNYLAND WHOLESALE FURNITURE COMPANY,
Respondents.

REPLY BRIEF FOR RESPONDENT, SUNNYLAND WHOLESALE FURNITURE COMPANY

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No. 642

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UNITED STATES OF AMERICA, INTERVENOR,
Petitioner,

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., and SUNNYLAND WHOLESALE FURNITURE COMPANY,
Respondents.

REPLY BRIEF FOR RESPONDENT, SUNNYLAND WHOLESALE FURNITURE COMPANY

OPINIONS BELOW

The opinion of the District Court (R. 53-57) is reported at *107 F. Supp. 405*. The majority and dissenting opinions in the Court of Appeals (R. 83-93) are reported in *209 F. 2d 684*.

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether certain tax liens held by the United States were subordinate to a choate attachment-before-judgment lien accorded by state law to the plaintiff in a civil action, where the federal tax liens arose subsequent to and were recorded subsequent to the attachment lien.

STATUTES INVOLVED

The pertinent statutes involved are set forth in the Appendix to the petition at pp. 10-13.

STATEMENT

The statement of the case as set forth in the petition, pp. 2-5 is substantially correct.

There is no Conflict of Decision and no Need for the Exercise of the Supervisory Powers of Review of the Supreme Court

In examining the question presented in this case, care must be exercised to avoid "begging the question," as the Government does in its petition in setting forth the question to be decided by this court. One of the principal questions decided by the lower court was as to the nature of the lien under consideration there, the lower court finding it to be choate. The lower court carefully examined the facts in this case in the light of the case of *United States v. Security Trust and Savings Bank*, 340 U. S. 47, and found the instant case distinguishable from the *Security Trust* case. There was no failure by the lower court to accept the

principles of the *Security Trust* case as controlling in this instance.

It found, however, that the Statutes of Texas *(Vernon's Rev. Texas Civil Statutes*, 1925, Articles 300, 301, 4076, and 4084.) create a lien which is construed as being a choate lien upon the personal property dating from the instant of the levy of the writ. This is well established in the case of *United States v. Yates, 204 S. W. 2d 399, writ ref.*, in which the same arguments and authorities advanced by the Government in the lower court herein were considered by the Texas court and that court concluded that, regardless of what might be the law in other states, in Texas an attachment lien was perfected, fixed, specific, and choate from the instant of the levy of the writ. It should be noted that the Texas Statute creates a lien by its very terms, whereas the California Statute only attaches the property of the defendant *as security* for the satisfaction of a judgment that may be obtained. It should be noted that under the Texas Law, contrary to what may be the case in other states and particularly contrary to the fact situation in the case of *United States v. Acri, 109 F. Supp. 943 (N. D. Ohio)*, in order to levy a writ of attachment, the defendant's liability must be absolute and not a mere contingent one – a liquidated claim and not an unliquidated one, and must be claimed by affidavit under oath as to justness and the amount. See *5 Tex. Jur., p. 179, Sec. 15.* The Statutes of Texas are designed to aid the diligent. No less a burden should be placed on the government. The Texas cases cited in the Petition, p. 7, deal not with

the nature of a garnishment lien in Texas, but with the method of enforcing the lien. A mortgage is a choate lien even though it must be enforced by a foreclosure suit carried to final judgment.

Having found the lien involved herein to be a choate one under the laws of Texas, this case is further distinguishable upon its facts from the *Security Trust* case, supra, in which this court was bound by the holding of the highest court of the State of California, that the liens under consideration there were inchoate. No such holding occurs in the law of Texas. Granted that the characterization of a lien by the state as specific and perfected is not, of course, conclusive against the federal government, still it should be given great weight. *United States v. Security Trust and Savings Bank*, supra. The liens created by Sec. 3670 are general liens upon all of the property or rights to property, whether real or personal, belonging to such person, which liens are subject to the ordinary rule of priority, that first in time is first in right. Sec. 3670 does not attempt to set up a priority for the federal government as does Sec. 3466, which sets forth a priority after a lien is established in the event that the taxpayer is insolvent. No insolvency has been alleged by the Government; hence no special rule of priority under Sec. 3466 is involved. The general lien which the government claims, attaches to the tax debtor's property in the condition in which it exists at the date the lien arises, and the government's rights can rise no higher than those of the taxpayer, *New York Casualty Co. v. Zwerner*, *58 F. Supp. 473 (D. C., Ill.). 47 Corpus Juris Secundum 994.*

The Government's right under its lien must be subject to the perfected lien of Sunnyland. However, even in construing the priority statute Sec. 3466, this court in *United States v. Waddill Co., 323 U. S. 351*, said, "This court has in the past recognized that certain exceptions could be read into this statute. The question has not been expressly decided as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or involuntary assignment." Nor in cases not involving insolvency has the court ever expressly held that a specific and perfected lien is not an exception impliedly exempt from Sec. 3670-72, *United States v. Gilbert Associates, 345 U. S. 361.* Even in these insolvency situations, this court in the case of *Illinois v. Campbell, 329 U. S. 362*, held under a long established rule that in determining whether the lien was specific and perfected, there were three essential elements, to-wit: *The identity of the lienor, the amount of the lien*, and *the property to which it attaches.* See also *United States v. City of New Britain, Conn., et al., 347 U. S. 81.* Under the facts of this case, these tests are well met, as Sunnyland had more than a general power over unspecified property, having an interest in a clearly divided portion of the assets based on a liquidated claim to the extent of a definite ascertained sum of dollars and cents which had been severed from the assets of the tax debtor by a lien which attached at the time of the levy of the writ. At that moment the identity of the lienor, the amount of the lien, and the property to which it attached were absolutely known. These principles were accepted in the case of *United States v.*

Albert Holman Lumber Company, 206 F. 2d 685 (C. A. 5), Rehearing denied, 208 F. 2d 113 (C. A. 5). There was more than a caveat of a more perfect lien to come since there was an actual seizure and separation of the assets. We contend that at the time the government's lien arose, the garnishment lien possessed "the characteristics of a specific perfected lien which alone bars the priority of the United States." See *United States v. Knott, 298 U. S. 544, United States v. Albert Holman Lumber Company,* supra. As aforestated, the general lien of the United States can only attach to the property belonging to the tax debtor at the time the government's lien arises. The facts show that the government's lien arose no earlier than the date when the assessment list was received, which was subsequent to the fastening of the Sunnyland lien.

There is no need to rely on any doctrine of relation back which has been specifically negatived by this court in the *Security Trust* case. The lien in Texas exists from the date of levy. Certain it is that there are subsequent events which may at a future time negative the lien, but until and unless those events occur, the lien exists and is specific and choate. This is nonetheless true in the case of a judgment lien which may at a later date be vacated by reversal by the higher court or in the case of a mortgage and note which may actually require the filing of a law suit, and the obtaining of a judgment foreclosing said mortgage, in which case it may be found that the mortgage and note may be subject to any number of defenses, such as fraud, forgery,

accord and satisfaction, payment, etc., thus eventually vacating the lien, or in the case of the government tax lien itself it may be later determined that the assessment was in error or that the amount claimed was excessive or that the principle of tax law relied upon was not proper, and the government's tax lien itself may be vacated by subsequent events. In any event, until such subsequent event occurred, the liens mentioned herein, as well as the garnishment lien, exist and are choate, though in all cases subject to future defense which may reduce or upset them. Is a tax assessment any more sacrosanct or irreducible?

It has been determined by this court that the "Federal Statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States." See *United States v. City of New Britain, Conn., et al.*, 347 U. S. 81, in which case this court also stated that "Thus priority of each statutory lien contested here must depend upon the time it attached to the property in question and became choate."

We submit, therefore, that this case is distinguishable from the *Security Trust* case both because of the law of Texas and the actual facts of the case, and that there is no conflict in the holding of the lower court with the principles laid down by the Supreme Court; hence, the public interest does not require that this court grant certiorari.

The Decision of the Court Below is Clearly Correct

If it be agreed that the lien of Sunnyland was a choate lien at the time the writ was served and since the debtor

is not insolvent, Congress, having failed to expressly provide for federal priority, the priority of the liens is determined by a well-known principal of law, to-wit: The first in time is the first in right. This rule was stated by Chief Justice Marshall in the case of *Rankin v. Scott, 12 Wheat at page 179, 6 L. Ed. 592*, and reaffirmed by this court in the recent holding in the case of *United States v. City of New Britain, Conn., et al., 347 U. S. 81*, in which this court said, referring to the rule in the *Rankin* case, "We think that Congress had this cardinal rule in mind when it enacted Sec. 3670, a schedule of priority not being set forth therein. Therefore, if both the Sunnyland liens and the government liens are choate, whether they be general or specific, the Sunnyland lien being first in time is first in right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied, and if the same be granted, that the case be in all things affirmed.

Respectfully submitted,

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I hereby certify that copies of this brief have been served upon the Honorable Simon E. Sobeloff, Solicitor General, United States Department of Justice, Washington 25, D. C., Counsel for Petitioner and also upon Mr. Searcy L. Johnson, Mercantile Bank Building, Dallas, Texas, and R. B. Cousins, III, 1011 Mercantile Securities Bldg., Dallas, Texas, Counsel for Respondents, Liverpool & London & Globe Insurance Company, Ltd.